Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1995

MAHESH K. SINGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department, State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a presumption of vindictiveness arise where a sentencing judge imposes a sentence three to nine times greater than that recommended by the prosecutor following a defendant's rejection of a plea bargain and the election to exercise the right of trial by jury?

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No.

In the

Supreme Court of the United States

October, 1995

MAHESH K. SINGH,

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vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department, State of New York

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Mahesh K. Singh, prays that a writ of certiorari issue to review the judgment of the Supreme Court, Appellate Division, Second Department, State of New York, entered in the above case on March 20, 1995 (App. D, 7a-9a). The Court of

Appeals of the State of New York denied permission to appeal by certificate denying leave dated March 30, 1995 (App. C, 5a-6a). A certificate denying leave upon reconsideration was entered by the Court of Appeals on April 28, 1995 (App. B, 3a-4a). An application for reconsideration was denied by certificate of the Court of Appeals dated August 17, 1995 (App. A, 1a-2a).

OPINION BELOW

The Decision and Order of the Supreme Court, Appellate Division, Second Department, State of New York, is not reported and is printed in full in the appendix to this petition (App. D, 7a-9a).

STATEMENT OF JURISDICTION

The Decision and Order of the Supreme Court, Appellate Division, Second Department, State of New York, was entered on March 20, 1995 (App. D, 7a-9a). Leave to appeal was denied by certificate of the New York Court of Appeals on March 30, 1995 (App. C, 5a-6a). Reconsideration of said denial of leave was denied by certificates of the New York Court of Appeals on April 28, 1995 (App. B, 3a-4a) and on August 17, 1995 (App. A, 1a-2a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment of the Constitution of the United States (App. E, 00a).

STATEMENT OF THE CASE

Petitioner, Mahesh K. Singh, was tried and convicted in the Supreme Court of New York, County of Suffolk, on charges of

attempted criminal possession of stolen property in the second degree and conspiracy in the fourth degree.[1] On December 17, 1993, he was sentenced to a term of one and one-half to four and one-half years imprisonment on the attempt conviction and a concurrent term of six months, with five years probation, on the conspiracy charge.[2] During the sentencing proceeding, petitioner's counsel urged that Mr. Singh's background made him a worthy candidate for a sentence of community service in lieu of incarceration (App. F, 12a-14a). The assistant district attorney recommended that petitioner be sentenced to six months in the Suffolk County Jail and five years probation (App. F, 14a). In response to that recommendation, the judge stated:

> You raise an interesting point here. He's an educated man who denies his guilt and now wants mercy as if he could just come in here and say to this community and society, the amount of money it cost to run the court, plus trying to put me in a no-win position of being

---

1. The record reflects that the indictment of petitioner and two others resulted from a sting operation conducted by the Suffolk County Police. In setting up the sting operation, the police did not use stolen goods but borrowed Estee Lauder cosmetics from that company. It was alleged that the defendants attempted to purchase a quantity of Estee Lauder cosmetics believing the merchandise to be stolen.

Also convicted with defendant, Mahesh K. Singh, was defendant, Georgia Perry-Raccis. Her conviction is not involved in this petition.

2. Although unrelated to this petition, it is noted that the sentence was modified by the Supreme Court, Appellate Division, Second Department, State of New York, by vacating the terms of six months imprisonment and five years probation imposed upon the conspiracy conviction and resentencing petitioner to a definite term of six months imprisonment to run concurrently with the sentence for attempted criminal possession of stolen property (Appendix D, 7a-9a).

> fair to everybody else. Why did he stand trial? You are intimating that he committed the crime and if he committed the crime, what we say, he can't lose, can he? That's my moral problem. You know, you work in these courts that the object of — the high numbers come through here, dispose of charges, first offenders as well as everybody else. You can't have it both ways.
>
> The jury found you guilty. The manpower, everything else, if you came in originally, you would have gotten — it is normal to admit his guilt and be on probation.[3]
>
> * * *
>
> Let me put it bluntly. Why is it, to give him what he would have gotten if he had been willing to admit his guilt and take a plea, and he denied that, put society to the expense and time and involvement of a trial and then when he loses, says, "Give me what I should have gotten." That's all.

(App. F, 14a-15a).

In his brief before the Appellate Division, petitioner's counsel urged that the sentence which was imposed was harsh and excessive. In its Decision and Order affirming the conviction, the Appellate Division stated, ". . . we do not agree with Singh's contention that the sentence imposed was excessive (*see People v. Suitte*, 90 AD2d 80)." (App. D, 9a). The issue of the

3. Defendant apparently was originally offered a recommendation of probation as a part of a proposed plea bargain.

excessiveness of the sentence was set forth in the application for a certificate granting leave to appeal made to the Court of Appeals of the State of New York and also in the application for reconsideration of that tribunal's denial of leave to appeal.

The petitioner began serving his sentence on May 15, 1995. He is continuing to serve that sentence at the present time.

REASONS FOR GRANTING THE WRIT

It is abundantly clear from the record that Mahesh K. Singh was the victim of a sentencing judge's vindictiveness occasioned by petitioner's rejection of a plea bargain (which apparently would have brought a recommendation of probation) and election to exercise the right to trial by jury. The judge stated as much in his remarks at the time he imposed a sentence of one and one-half to four and one-half years. It is surprising that with such an unambiguous record, the Appellate Division of the Supreme Court of New York did not immediately set aside the sentence based upon its own prior decisions and its presumed awareness of this Court's holdings in *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) and its progeny. Despite the predictability of the appellate outcome, the Appellate Division seemingly ignored the judicial precedents and affirmed the validity of the sentence imposed upon Mahesh K. Singh.

It has been more than 25 years since this Court has addressed the issue of the presumption of vindictiveness in *Pearce*. The appropriateness of granting a writ of certiorari to the Appellate Division, Second Department of the Supreme Court of New York is underscored by the Appellate Division's inconsistent holdings on this important question of due process under the Fourteenth Amendment of the United States Constitution, leaving petitioner (and presumably any others similarly situated) in the unfortunate position of serving an enhanced sentence for an unconstitutional reason.

It is acknowledged at the outset that the factual situation presented in *North Carolina v. Pearce, supra*, is different from the instant case. In the former, a defendant had successfully appealed his first conviction. After conviction on retrial, he received a stiffer sentence by the same trial judge. This Court held that the Due Process Clause of the Fourteenth Amendment of the United States Constitution prevented such outcome, given that a defendant has a clear right to invoke all available appellate remedies after conviction. Here, petitioner engaged in plea negotiations prior to trial, apparently involving an offer by the prosecution to recommend a probationary term in exchange for a plea of guilty, the offer of which the trial judge indicated he was aware. Petitioner rejected the proposal, electing to exercise his constitutional right to a trial by jury.[4]

Following conviction, the trial judge, in an expression of clear and unambiguous motivation, not only rejected defense counsel's urging for a non-custodial sentence, but also rejected the prosecutor's recommendation that the sentence be only six months. Instead, he imposed a sentence that was three to nine times that which was recommended by the prosecutor. In so doing, the trial judge candidly stated as his reason that the petitioner had a chance to plead guilty and that he was being punished for putting the court and the state to the cost and effort of conducting a trial.

As suggested, *supra*, with such record before it, it would have seemed probable that the Appellate Division would summarily have vacated the sentence on the ground that it was excessive and blatantly violated the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

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4. It is a reasonable inference that if the petitioner was being given an opportunity for probation, he must have believed passionately in his innocence. Why else would he elect to stand trial?

That such did not occur may be reflective of the need for this Court to provide guidance to the states where the facts, unlike those which existed in *North Carolina v. Pearce, supra*, suggest not that a presumption of vindictiveness comes into play but rather that an irrebuttable presumption of vindictiveness arises in certain circumstances such as those here presented.

To illustrate the inconsistency reflected in the decisions of the New York Appellate Division, petitioner points to the case of *People v. Patterson*, 106 A.D. 2d 520, 483 N.Y.S. 2d 55 (2nd Dept. 1984). In that case, the New York Appellate Division observed that by pleading guilty, a defendant may avoid the danger of a more serious conviction with its attendant consequences. And, too, it was pointed out that a sentence offered as an inducement for a guilty plea may be more lenient than would otherwise have been the case as a benefit bestowed for the avoidance of unnecessary criminal litigation. But, the Appellate Division further held:

> A person may not, of course, be punished for doing what the law allows him to do. . . . If a defendant refuses to plead guilty and goes to trial, retaliation or vindictiveness may play no role in sentencing following a conviction. . . . Rather, the conventional concerns involved in sentencing, which include the considerations of deterrence, rehabilitation, retribution, and isolation, must be the only factors weighed when sentence is imposed. . . . In this case, the record establishes that in imposing a sentence, the trial court impermissibly increased defendant's punishment solely for asserting his right to a trial. Based upon our independent review of the proper factors to be

> considered, we have reduced the sentence to one which satisfies the acceptable objectives of sentencing.

(483 N.Y.S. 2d at p. 57).

With the *Patterson* holding arising from its own Department, the irresistible conclusion is that the Appellate Division in the instant case either misapplied the holding of this Court in *North Carolina v. Pearce* or felt that the facts of Mahesh K. Singh's matter significantly differed in quality from those presented in *Patterson, supra*. The latter conclusion is fortified by the fact that the Court of Appeals declined twice to grant review of this case, first in its certificate denying leave, which was later rescinded on technical grounds, and again following petitioner's application for reconsideration. While it is understood that such declination is not evidence of any substantive determination, nonetheless, the significance cannot be overlooked, and the need for the guiding hand of this Court becomes all the more compelling.

It is submitted that the facts of the instant case provide a suitable opportunity for this Court to eliminate any misapprehension or confusion which exists in the states, as exemplified by the New York holdings, *supra*. Grant of the writ in this case will likely bring to an end the unfortunate and unconstitutional suffering being experienced by Mahesh K. Singh and provide guidance to the states so that no other person will suffer from a denial of the same constitutional right.

CONCLUSION

For the foregoing reasons, petition for writ of certiorari should be granted.

Respectfully submitted,

BARRY H. EVENCHICK
Counsel of Record
RACHEL N. DAVIDSON
HELLRING LINDEMAN
GOLDSTEIN & SIEGAL
Attorneys for Petitioner

APPENDIX A — CERTIFICATE DENYING LEAVE UPON RECONSIDERATION DATED AUGUST 17, 1995

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. VITO J. TITONE Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

MAHESH K. SINGH and GEORGIA PERRY-RACCIS,

Appellants.

CERTIFICATE DENYING LEAVE
UPON RECONSIDERATION

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

* Description of Order:

Order of the Appellate Division Second Department, dated March 20, 1995, affirming two judgments (one as to each of the defendants), of the Supreme Court, Suffolk County, both rendered December 17, 1993.

Appendix A

Dated at Staten Island, New York

August 17, 1995

s/ Vito J. Titone
Associate Judge

APPENDIX B — CERTIFICATE DENYING LEAVE UPON RECONSIDERATION DATED APRIL 28, 1995

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. VITO J. TITONE Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

MAHESH K. SINGH and GEORGIA PERRY-RACCIS,

Appellant.

CERTIFICATE DENYING LEAVE
UPON RECONSIDERATION

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

* Description of Order:

Order of the Appellate Division Second Department, dated March 20, 1995, affirming two judgments (one as to each of the defendants), of the Supreme Court, Suffolk County, both rendered December 17, 1993.

Appendix B

Dated at Albany, New York

April 28, 1995

s/ Vito J. Titone
Associate Judge

APPENDIX C — CERTIFICATE DENYING LEAVE DATED MARCH 30, 1995

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. VITO J. TITONE Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

MAHESH K. SINGH and GEORGIA PERRY-RACCIS,

Appellant.

CERTIFICATE DENYING LEAVE

I, VITO J. TITONE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. *Stay denied as academic.*

* Description of Order:

Order of the Appellate Division Second Department, dated March 20, 1995, affirming two judgments (one as to each of the defendants), of the Supreme Court, Suffolk County, both rendered December 17, 1993.

Appendix C

Dated at Albany, New York

March 30, 1995

s/ Vito J. Titone
Associate Judge

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, DATED MARCH 20, 1995

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

6982q
C/hu

_____AD2d_____ Argued - February 3, 1995

FRED T. SANTUCCI, J.P.
DANIEL W. JOY
WILLIAM D. FRIEDMANN
ANITA R. FLORIO, JJ.

94-00685
94-00686

The People, etc., respondent, v Mahesh K. Singh and Georgia Perry-Raccis, appellants. (Ind. Nos. 488-B93 and 488-C93).

DECISION & ORDER

Russo, Fox & Karl, Hauppauge, N.Y. (Kevin M. Fox of counsel), for appellants.

James M. Catterson, Jr., District Attorney, Riverhead, N.Y. (Patricia A. Murphy of counsel; Jennifer Lupo on the brief), for respondent.

Appendix D

Appeal by the defendants from two judgments (one as to each of them) of the Supreme Court, Suffolk County (McInerney, J.), both rendered December 17, 1993, convicting Mahesh K. Singh of attempted criminal possession of stolen property in the second degree and conspiracy in the fourth degree, upon a jury verdict, and sentencing him to a term of 1 1/2 to 4 1/2 years imprisonment on the conviction of attempted criminal possession of stolen property in the second degree and a concurrent term of six months imprisonment and five years probation of the conviction of conspiracy in the fourth degree; and convicting Georgia Perry-Racis of attempted criminal possession of stolen property in the second degree and conspiracy in the fourth degree, upon a jury verdict, and sentencing her to two concurrent terms of five years probation plus 450 hours of community service in lieu of a term of imprisonment of 90 days.

ORDERED that the judgment as to Mahesh K. Singh is modified, on the law, by vacating the term of six months imprisonment and five years probation imposed upon the conviction of conspiracy in the fourth degree and resentencing him to a definite term of six months imprisonment to run concurrently with the sentence of imprisonment imposed upon his conviction of attempted criminal possession of stolen property in the second degree; as so modified, the judgment as to Mahesh K. Singh is affirmed; and it is further,

ORDERED that the judgment as to Georgia Perry-Raccis is affirmed.

Viewing the evidence in the light most favorable to the prosecution (*see*, *People v. Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the respective defendants' guilt of attempted criminal possession of stolen property in the second

degree and conspiracy in the fourth degree beyond a reasonable doubt.

While the admission of the hearsay statements of the codefendant John Papadakis was error because the People failed to show that he was unavailable to testify, the error was harmless in light of the overwhelming evidence of the defendants' guilt (*see, People v Crimmins*, 36 NY 2d 230).

We agree with the defendant Mahesh K. Singh's contention that it was impermissible to impose a sentence of six months imprisonment and five years probation on the conviction of criminal conspiracy in the fourth degree to run concurrently with the indeterminate sentence of 1 1/2 to 4 1/2 years imprisonment on the conviction of attempted criminal possession of stolen property in the second degree (*see, People v. Cerilli*, 80 NY2d 1016). We have, therefore, vacated the split sentence and imposed a definite sentence instead. However, we do not agree with Singh's contention that the sentence imposed was excessive (*see, People v. Suitte*, 90 AD2d 80).

The defendants' remaining contentions are either unpreserved for appellate review or without merit.

SANTUCCI, J.P., JOY, FRIEDMANN and FLORIO, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

March 20, 1995

APPENDIX E — FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

FOURTEENTH AMENDMENT, SECTION ONE TO THE UNITED STATES CONSTITUTION

Fourteenth Amendment, Section 1, to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F — EXCERPTS FROM TRANSCRIPT OF SENTENCE DATED DECEMBER 17, 1993

COUNTY COURT OF THE COUNTY OF SUFFOLK

STATE OF NEW YORK

Indictment No. 488B-93

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MAHESH K. SINGH,

Defendant.

Indeterminate Sentence

December 17, 1993
Riverhead, New York

Before:

HON. GEORGE F. X. McINERNEY
Supreme Court Justice

Appearances:

JAMES M. CATTERSON, JR., ESQ.
District Attorney of Suffolk County
Criminal Courts Building
Riverhead, New York
BY: KEVIN SLATTERY, ESQ.
Assistant District Attorney
For the People

Appendix F

RUSSO, FOX & KARL, ESQS.
400 Townline Road
Hauppauge, New York 11788
BY: KEVIN FOX, ESQ.
For the Defendant

Ann Rogak
Official Court Reporter

[2] MR. FOX: Kevin Fox, Russo, Fox & Karl, 400 Townline Road, Hauppauge.

THE CLERK: What is your date of birth?

THE DEFENDANT: March 10, 1956.

THE COURT: Yes, sir, are you ready for sentencing?

MR. FOX: Yes, Judge.

THE COURT: I will listen.

MR. FOX: Judge, I have had an opportunity to review the probation report. This case was a trial before you. You had an opportunity to hear all the evidence and also, had the opportunity to hear Mr. Singh testify in his own behalf concerning the charges against him. Despite all that, he was convicted by the jury and at this time he is here before you for sentencing.

Mr. Singh is 38 years old. As you know from the probation report, and his own testimony, he is an educated man. He has two master's degrees, one in business and administration and he, based upon the [3] letters that we have provided to you,

apparently he is a very hard working man. He is a very responsible man. He is married. He has a wife in India who recently just gave birth to their first child. He runs his own business in Staten Island with Georgia Perryraccis, who is the co-defendant, and his only employee.

The letters that I have provided to you, Judge, speak very highly of him. Some of the words that are used, they call him honest, generous, he is supportive, he is a man of integrity, he is a trustworthy, dependable. All of those letters seem to indicate that he has these character traits.

This particular situation, your Honor, I think was an aberration from his normal behavior and that he was misled by a man by the name of John Poppadakis (phonetic), into something that I think Mahesh sees now that he should not have been involved in, in any way whatsoever. [4] In fact, the police officer who testified here at the trial also indicated that Mr. Singh had reservations about proceeding forward with the transaction that was offered to him.

But, nevertheless, the jury found that he went a little bit too far, that he was guilty of this crime and now he stands before you ready for sentencing.

I would only ask the Court to consider his background, to consider the fact that he is the sole owner of this business, which he needs for himself as well as his wife and brand-new child, and that if you were to sentence him to incarceration that would severely inhibit his ability to make a living. He has been punished fairly severely in this case already, having been caught up in the criminal justice system, going to trial, being convicted. He has also lost $78,000 which has been confiscated and will be

forfeited, apparently. There has been actions brought against him to [5] forfeit that $78,000 which was not really his money, only a small portion of that was his money, and he must pay that back to the people that he had borrowed it from. So, it is a rather substantial loss to a man who really only makes about $38,000 a year.

Your Honor, I would simply ask that in lieu of any incarceration that has been recommended by the District Attorney and the Probation Department, that you consider the possibility of allowing him to do community service. I think that he would be a good candidate for community service. He is not the type of individual that would do well in a structured environment such as incarceration, and I think they could do bring to somebody some benefit through community service rather than simply sitting in a jail for four months and doing no benefit for anybody.

I just ask you to consider that in imposing a sentence.

[6] MR. SLATTERY: Judge, as counsel indicated, Mr. Singh is an educated man. He holds two advanced degrees. He went into this with his eyes open. I believe he knew exactly what he was getting involved in. On more than one occasion during the course of this transaction, if he was a law abiding citizen, he would have backed away from the deal, questioned it, not gone through with it.

The People are recommending that this Defendant be sentenced to six months in the Suffolk County Jail and five years probation.

THE COURT: You raise an interesting point here. He's an

educated man who denies his guilt and now wants mercy as if he could just come in here and say to the community and society, the amount of money it cost to run the court, plus trying to put me in a no-win position of being fair to everybody else. Why did he stand trial? You are intimating that he committed the crime and if he committed [7] the crime, what we say, he can't lose, can he? That's my moral problem. You know, you work in these courts, that the object of — the high numbers come through here, dispose of charges, first offenders as well as everybody else. You can't have it both ways.

The jury found you guilty. The manpower, everything else, if you came in originally, you would have gotten — it is normal to admit his guilt and be on probation.

Anything else to add?

Am I wrong in my analysis?

MR. FOX: I am just trying to understand your analysis.

THE COURT: Let me put it bluntly. Why is it, to give him what he would have gotten if he had been willing to admit his guilt and take a plea, and he denied that, put society to the expense and time and involvement of a trial and then when he loses, says, "Give me what I should have gotten." That's all.

[8] Mahesh Singh, for the crime of Conspiracy in the Fourth Degree under Count 1, an E Felony, Indictment 488B-93, it is the judgment of this Court that you be delivered to the custody of the New York State Department of Correction to serve an indeterminate period of incarceration therein, the minimum of such period not to be less than one and a half years and the maximum thereof not more than four and a half years.

Appendix F

With respect to Criminal Possession of Stolen Property, the Second, E Felony, under same indictment, it is the judgment of this Court you be sentenced to a period of six months and five years to be served concurrently.

THE CLERK: Let the record show that I gave the wrong numbers, the wrong letters.

Count 1 is stolen property. That is one and a half to four and a half.

THE COURT: The crime of Attempted Criminal Possession of Stolen property in [9] the Second Degree is a D Felony and the crime of Conspiracy in the Fourth Degree is an E Felony.

One and a half to four and a half, D Felony, Attempted Criminal Possession of Stolen Property, and the other is six months and five years probation to be served concurrently.

Defendant is remanded.

MR. FOX: Judge, may I be heard briefly, Judge?

THE COURT: Yes.

MR. FOX: This is a very busy time of year for Mr. Singh's business. We did not think we would be looking at an upstate incarceration, since based upon the recommendation of the District Attorney, as well as the Probation Department —

THE COURT: I follow them every time they agree with me, counselor.

Appendix F

MR. FOX: I respectfully request that we have a period of time for Mr. Singh to take care of some of his

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No. 95-780

In The

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MAHESH K. SINGH,

Petitioner,

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court, Appellate Division Second Department, State Of New York

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a presumption of vindictiveness arise where a sentencing judge imposes a sentence three to nine times greater than that recommended by the prosecutor following a defendant's rejection of a plea bargain and the election to exercise the right of trial by jury?

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the judgment of the Supreme Court, Appellate Division, Second Department, State of New York, entered March 20, 1995 in People of the State of New York v. Mahesh K. Singh.

JURISDICTION

Petitioner seeks a writ of certiorari pursuant to 28 U.S.C.A. §1257. Respectfully, we maintain that the question presented was not raised and preserved for review thus the New York State Court of Appeals did not pass on the question presented and, therefore, 28 U.S.C.A. §1257 may not properly be invoked.

REASONS FOR DENYING THE WRIT

Pursuant to United States Supreme Court Rule 15, subd. 1, 28 U.S.C.A., respondent is obliged to point out "perceived misstatements of fact and law set forth in the petition which have bearing on the question of what issues would properly be before the Court if certiorari were granted." Consistent with this obligation, respondent observes that:

(1) Petitioner misstated the procedural history of the New York State Court of Appeals consideration of the question "whether the cruel and unusual punishment

provisions of the United States and New York Constitutions are violated when a sentencing judge rejects the People's sentencing recommendation and instead imposes a greater sentence, for no reason other than the defendant elected to stand trial before a jury?" (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995, at pp. 2-3);

(2) Petitioner misstated the constitutional argument presented to the New York State Court as petitioner urged to the Court of Appeals solely a violation of the New York State and United States Constitutional protection against "cruel and unusual punishment (U.S. Constitution 8th Amendment; N.Y. Constitution Art. 1, sec. 5)" (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995, at p. 9). Thus, although petitioner presently claims that:

> "The issue of the excessiveness of the sentence was set forth in the application for a certificate granting leave to appeal made to the Court of Appeals of the State of New York and also in the application for reconsideration of that tribunal's denial of leave to appeal" (Petition for a Writ of Certiorari at p. 4-5),

no issue regarding petitioner's sentence was raised in either of the first two letters submitted to the Honorable Vito J. Titone, Associate Judge, Court of Appeals. The letters submitted, the initial one dated March 27, 1995, and the latter seeking to supplement the initial application, dated April 17, 1995, do not raise any issue regarding petitioner's sentence. In fact, in his final reconsideration application, petitioner noted, at page 2:

> "It should be noted that the issue regarding cruel and unusual punishment was not posed in previous submissions to Judge Titone. However, the issue of illegal sentence clearly was presented in the brief filed by appellants with the Appellate Division" (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995).

Clearly then, the only time petitioner raised any issue concerning his sentence in the Court of Appeals was in his final reconsideration application, dated May 4, 1995, and, as previously discussed, the constitutional provision petitioner claimed was implicated was not the Fourteenth Amendment of the Constitution of the United States, as presently urged in the Petition for a Writ of Certiorari at page 2, but the Eighth Amendment of the New York and United States Constitutions;

(3) Petitioner inappropriately urged that there is significance to the denial of leave to appeal by the Court of Appeals. The assertion by petitioner in his Petition for a Writ of Certiorari, at page 8, that

> "with the Patterson holding arising from its own Department, the irresistible conclusion is that the Appellate Division in the instant case either misapplied the holding of this Court in *North Carolina v. Pearce* or felt that the facts of Mahesh K. Singh's matter significantly differed in quality from those presented in Patterson, *supra. The latter conclusion is fortified by the fact that the Court of Appeals declined twice to grant review of this case, first in its certificate denying leave, which was later rescinded on technical grounds, and again following petitioner's application for reconsideration. While it is understood that such declination is not*

> *evidence of any substantive determination, nonetheless, the significance cannot be overlooked, and the need for the guiding hand of this Court becomes all the more compelling"* (emphasis supplied),

is thus plainly erroneous as the sentencing issue was only presented in petitioner's very last submission to the court. Accordingly, absolutely no significance can attach to the fact that several applications were made and denied when only the last contained any issue concerning petitioner's sentence.

Additionally, petitioner argues, contrary to well-established New York law that denial of leave to appeal is not authority for any proposition of law (*Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284 (1929); *Calandra v. Rothwax*, 65 N.Y.2d 897 (1985)], that there is some significance to the Court of Appeals "declination" to grant leave to appeal;

(4) Finally, petitioner wholly ignored this Court's review of the "presumption of vindictiveness" in *Alabama v. Smith* 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989) in claiming in his Petition for a Writ of Certiorari, at page 5, that "it has been more than 25 years since this Court addressed the issue of the presumption of vindictiveness in *Pearce*."

In addition to the above perceived misstatements of fact or law, we urge that petitioner has misapprehended the guiding principles of this Court in seeking a writ of certiorari to review whether a presumption of vindictiveness arises in circumstances where there has been no successful appeal and ultimate resentence.

Petitioner's reliance on *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) is wholly misplaced. Petitioner ignores the significance of the fact that Pearce had been subjected to a longer sentence after his *successful appeal* and retrial. As this Court specifically observed in *Alabama v. Smith, supra*, 109 S.Ct. at 2204-2205:

> "While the *Pearce* opinion appeared on its face to announce a rule of sweeping dimension, our subsequent cases have made clear that its presumption of vindictiveness 'do[es] not apply in every case where a convicted defendant receives a higher sentence on retrial.' *Texas v. McCullough*, 475 U.S., at 138, 106 S.Ct., at 979. As we explained in *Texas v. McCullough*, 'the evil the [*Pearce*] Court sought to prevent' was not the imposition of 'enlarged sentences after a new trial' but 'vindictiveness of a sentencing judge.' *Ibid.* See also *Chaffin v. Stynchcombe*, 412 U.S. 17, 25, 93 S.Ct. 1977, 1982, 36 L.Ed.2d 714 (1973) (the *Pearce* presumption was not designed to prevent the imposition of an increased sentence on retrial 'for some valid reason associated with the need for flexibility and discretion in the sentencing process.' but was 'premised on the apparent need to guard against *vindictiveness* in the resentencing process'). Because the *Pearce* presumption 'may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct.' *United States v. Goodwin, supra*, 457 U.S., at 373, 102 S.Ct., at 2488, we have limited its application, like that of 'other "judicially created means of effectuating the rights secured by the [Constitution]," ' to circumstances 'where its "objectives" are thought most efficaciously served."' *Texas v.*

> *McCullough, supra,* 475 U.S., at 138, 106 S.Ct, at 979, quoting *Stone v. Powell,* 428 U.S. 465, 482, 487, 96 S.Ct. 3037, 3046, 3049, 49 L.Ed.2d 1067 (1976). Such circumstances are those in which there is a 'reasonable likelihood,' *United States v. Goodwin, supra,* 457 U.S., at 373, 102 S.Ct., at 2488, that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority. Where there is no such reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness, see *Wasman v. United States,* 468 U.S. 559, 569, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984)."

Thus, in *Alabama v. Smith, supra,* where the petitioner was successful on his *appeal* from his prior guilty *plea* and a longer sentence after *trial* on the original charges was imposed, this Court found that since there was no "reasonable likelihood" that the judge was motivated by vindictiveness and that, therefore, there was no basis for application of the presumption of vindictiveness, petitioner must bear the burden of proving *actual vindictiveness* on the part of the trial judge.

Therefore, petitioner here, falling within the general rule, must prove actual vindictiveness, as the rebuttable presumption of vindictiveness on the part of the sentencing judge applies *only* in circumstances where, upon a retrial after a *prior trial,* a greater sentence is imposed. *Wasman v. United States,* 468 U.S. 559, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

Petitioner has wholly ignored this Court's decision in *Corbitt v. New Jersey,* 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) in which this Court, consistent with its prior approval of the plea bargaining process, held that the

New Jersey sentencing scheme which conferred substantial leniency upon a defendant who pleaded guilty of homicide and mandated life imprisonment for those who were convicted after trial did not violate the 14th Amendment right to equal protection. Thus, *supra*, 99 S.Ct. at 500-501, the Court held:

> "Appellant also argues that the sentencing scheme infringes his right to equal protection under the Fourteenth Amendment because it penalizes the exercise of a "fundamental right." We rejected a similar argument in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), noting that "[t]o fit the problem . . . into an equal protection framework is a task too Procrustean to be rationally accomplished". Id., at 723, 89 S.Ct., at 2079. All New Jersey defendants are given the same choice. Those electing to contest their guilt face a certainty of life imprisonment if convicted of first-degree murder; but they may be acquitted instead or, in a proper case, may be convicted of a lesser degree of homicide and receive a sentence of less than life. Furthermore, a plea of non vult may itself result in a life sentence. The result therefore,
>
> > "may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a state has invidiously 'classified'. . . . " Id., at 722, 89 S. Ct., at 2079.
>
> It cannot be said that defendants found guilty by a jury are "penalized" for exercising the right to a jury trial any more than defendants who plead guilty are penalized because they give up the chance of acquittal at trial. In each instance,

> the defendant faces a multitude of possible outcomes and freely makes his choice. Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision.";

Clearly then, there is no question presented upon which a writ of certiorari ought to be granted since this Court has resolved the issue consistent with its position articulated in *Corbitt v. New Jersey, supra.*

Finally, we urge that on the record below, actual vindictiveness is not demonstrated. We note that petitioner himself has categorized his argument as resting on *implication,* as he urged that the trial judge had only "impliedly admit[ted]" to the imposition of the greater sentence as a result of the choice to stand trial (Application for Reconsideration of Denial of Leave to Appeal, dated May 4, 1995, at p. 10).

We maintain, as we did in opposing petitioner's application for reconsideration, by letter dated May 9, 1995:

> "Additionally, the court did not impermissibly punish appellant Singh for standing trial. A plain reading of the minutes reveals that, although somewhat inartfully stated, the trial court explained that although the State may confer substantial benefit on a defendant who chooses to spare the State a trial and thus sentence the defendant on a negotiated plea to *less* punishment than otherwise would be appropriate under the facts, that after trial, the court, now fully informed of the defendant's guilty actions, will impose the full punishment merited by those actions."

Additionally, the trial court, cognizant of petitioner's *denial of any guilt in his sworn trial testimony* was constitutionally permitted to consider that petitioner's position at sentencing was, in essence, one in which he now *admitted guilt* and sought the leniency which would have been extended as a benefit of a plea, which demonstrated that he had been untruthful in his trial testimony. *Alabama v. Smith, supra,* 109 S.Ct. at 2206; *United States v. Grayson,* 438 U.S. 41, 53, 98 S.Ct. 2610, 2617, 57 L.Ed. 582 (1978).

Therefore, we respectfully urge that, on the record presented, there is no question raised by petitioner which requires resolution by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, THE QUESTION PRESENTED SHOULD BE ANSWERED IN THE NEGATIVE AND THE PETITION SHOULD BE DENIED IN ALL RESPECTS.

DATED: Riverhead, New York
December 12, 1995

Respectfully submitted,

JAMES M. CATTERSON, JR.
District Attorney of
Suffolk County

PATRICIA A. MURPHY
Deputy Chief, Appeals Bureau

No. 95-780

Supreme Court, U.S.
FILED
JAN 5 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MAHESH K. SINGH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department, State of New York

REPLY BRIEF FOR PETITIONER

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10 pp

FURTHER REASONS FOR GRANTING THE WRIT

I.

PETITIONER HAS PROPERLY INVOKED THE JURISDICTION OF THIS COURT UNDER 28 U.S.C. § 1257.

Respondent is incorrect in contending that Petitioner lacks the jurisdictional basis for seeking the grant of a petition for writ of certiorari. It is clear that Petitioner raised the issue of the excessiveness of his sentence at the earliest possible moment, *i.e.*, before the trial court and before the Appellate Division and in submissions to the New York Court of Appeals. The petition for a writ of certiorari clearly sets forth how the excessive sentence issue was originally raised (Petition for a Writ of Certiorari at pp. 4-5 and in Appendices D and F). This federal issue was preserved for appeal. As stated in Petitioner's Application for Reconsideration of Denial of Leave to Appeal, he "was punished for exercising his constitutional right [to a trial]. Such punishment is violative of fundamental rights protected under both the United States and New York Constitutions.[1] App. A, 1a.

Petitioner has tried in vain to obtain a reversal of the sentence which so obviously was excessive and apparently vindictive. Respondent is disingenuous in urging that Petitioner has misconceived the failure of the New York Court of Appeals to grant review. Petitioner made quite clear that the declination of the New York Court of Appeals to grant review ". . . is not evidence of any substantive determination. . . ." (Petition for a Writ of Certiorari at p. 8). Petitioner understands that the declination is not evidence of a substantive determination, but the declination cannot be thoroughly ignored inasmuch as it has

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1. A copy of the relevant section of this document is attached as Appendix A.

served, Petitioner contends, to perpetuate the constitutional violation that can only be remedied by this Court.

II.

THE PROTECTIONS OF *NORTH CAROLINA V. PEARCE* SHOULD BE EXTENDED TO THIS CASE.

Other than its lengthy quotes from the relevant cases, with which the Petitioner assumed the Court was familiar, the Respondent does little to address the points made by the Petitioner in his petition for certification. There are two issues presented by the Petitioner: presumption of vindictiveness and actual vindictiveness.

Respondent misses the point with regard to the presumption of vindictiveness. Everyone agrees that under *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) there is a presumption of vindictiveness where a defendant's sentence on retrial is greater than it was following the first trial. It is the Petitioner's position that the presumption of vindictiveness should be expanded to include cases where the sentencing judge sentences the defendant to a sentence many times greater than that recommended by the prosecution after a defendant has refused to plead guilty. This is a new issue for this Court and it should be addressed. It is not Petitioner's position that this presumption should necessarily apply to cases where the sentencing judge sentences a defendant to a sentence greater than was offered with a guilty plea. The prosecution's recommendation for sentencing Petitioner was already higher than that offered with the guilty plea and Petitioner does not argue that the prosecution's proposed sentence, had it been adopted by the sentencing judge, would have been constitutionally defective. Thus, the case of *Corbitt v. New Jersey*, 439 U.S. 212, 99 S. Ct. 492, 58 L. Ed. 2d 466 (1978) is irrelevant to this petition.

It is the Petitioner's contention that the same concepts that were the basis for the Court's decision in *North Carolina v. Pearce*, even as addressed in *Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989), apply to the circumstances of Petitioner's case. The protections of *Pearce* were meant to guard against the vindictiveness of the sentencing judge. The Court stated in *Alabama v. Smith* that it has limited the application of the presumption of vindictiveness "to circumstances where its objectives are thought more efficaciously served," *i.e.* circumstances "in which there is a 'reasonable likelihood' that an unexplained increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." 490 U.S. at 799 (citations omitted). Petitioner submits that where the sentencing judge imposes a sentence nine times greater than that recommended by the prosecution, that is just the kind of circumstance where the objectives of the presumption of vindictiveness would be efficaciously served.

Respondent states that the Petitioner must prove actual vindictiveness (Respondent's Brief p. 6). Petitioner has already asserted that there was actual vindictiveness in this case based upon the language in the transcript from the sentencing of the Petitioner by the trial judge. Respondent points to case law indicating that the sentencing judge may sentence the defendant to a higher sentence than he would have received if he had pled guilty. (Respondent's Brief p. 7). Again, the Respondent misses the point. In this case the sentencing judge sentenced the defendant to a sentence greater than he would have otherwise imposed, specifically because he knew of the plea bargain that the prosecutor offered to the defendant and he thought that the defendant should have accepted it. Because the defendant did not do so, the judge increased the sentence, in order to punish the Petitioner for putting the court and the state to the time and trouble of conducting a trial. The sentencing judge's own language on this issue is clear.

CONCLUSION

For the foregoing reasons, as well as those expressed in the Petition, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: January 5, 1995

APPENDIX A — EXCERPT FROM PETITIONER'S APPLICATION FOR RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

THE STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

MAHESH K. SINGH and GEORGIA PERRY-RACCIS,

Appellants.

APPLICATION FOR RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

RELIEF SOUGHT: Reconsideration of certificate denying leave to appeal and continuation of bail

ATTORNEY FOR DEFENDANT: Barry H. Evenchick, 2 West Northfield Road, Livingston, New Jersey 07039; Russo, Fox & Karl, 400 Townline Road, Hauppauge, New York 11788

ATTORNEY FOR PEOPLE: James M. Catterson, Jr., District Attorney of Suffolk County, Center Drive South, Riverhead, New York 11901

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* * * *

III. *The Cruel and Unusual Punishment Issue*

Appellant, Mahesh Singh, received a prison term from the trial judge of one and one-half to four and one-half years in prison, apparently by way of punishment for having elected to stand trial and be adjudged by a jury of his peers. No other conclusion can be reached. The People recommended at sentencing that Mr. Singh receive six months with five years' probation. In response to that recommendation, the judge stated:

> "You raise an interesting point here. He's an educated man who denies his guilt and now wants mercy as if he could just come in here and say to this community and society, the amount of money it cost to run the court,

plus trying to put me in a no-win position of being fair to everybody else. Why did he stand trial? You are intimating that he committed the crime and if he committed the crime, what we say, he can't lose, can he? That's my moral problem. You know, you work in these courts, and the object of — the high numbers come through here, dispose of charges, first offenders as well as everybody else. You can't have it both ways.

"The jury found you guilty. The manpower, everything else, if you came in originally, you would have gotten — it is normal to admit his guilt and be on probation."

(Transcript of indeterminate sentence, December 19, 1993, pages 6, lines 16 to 25 and page 7, lines 1 to 13, pages 6 and 7 being attached hereto as Exhibit "C").

The Constitutions of the United States and of the State of New York prevent the imposition of cruel and unusual punishment (U.S. Const. 8th Amdt; N.Y. Const. art. 1, sec. 5). The question which does not appear to have been decided by this Court, which is in need of resolution, is whether, as here, when a sentencing judge impliedly admits to the imposition of a sentence greater than would have been the case had the defendant not put the People to the test through the exercise of the right to trial by jury, a lesser sentence would have been imposed.

Appendix A

The irresistible conclusion to be drawn from the remarks of the trial judge at sentencing is that Mahesh Singh was punished for exercising his constitutional right. Such punishment is violative of fundamental rights protected under both the United States and New York Constitutions. This Court, it is urged, should not countenance the punishment of a person, except upon a charge and opportunity for hearing.

There was no suggestion in this case that Mahesh Singh was guilty of perjury or that he was convicted for that crime. Certainly fundamental fairness and due process would be offended if further punishment were inflicted upon him for that crime, even if he were not charged with it and were not tried for it. That precept is what underlies decisions on this subject, and the conclusion of those courts which have considered it that,

> "... the right to defend would be unduly burdened if a defendant understood that, if convicted, his mere denial of the charge under oath would without more lead to successive convictions for perjury until he or the State was exhausted ... We here refer to the values embarrassed by a perjury prosecution in order to stress the wrongfulness of including in a sentence something extra upon a belief that the defendant lied in asserting his innocence...." (*State v. Poteet*, 61 *N.J.* 493, 496, 295 *A.2d* 857 (1972)).

The foregoing quote by the late Chief Justice Joseph Weintraub of the New Jersey Supreme Court expresses well

the problem presented by the present case. It would be plainly and fundamentally unfair, it is submitted, for a person to have to serve a prison sentence obviously longer than would otherwise have been the case solely because of the election to stand trial. The trial judge here clearly was miffed that the defendant did not plead guilty. The judge sent a message to other defendants, through this sentencing, that such would not be countenanced and that, upon a jury verdict of guilty, additional punishment would be imposed in the form of a longer sentence than prescribed or recommended. That is precisely what the Constitutions of the United States and New York prevent. It is urged that this question cries out for consideration at this time by this Court."***

* * * *

*** There can be no doubt that defense counsel did everything reasonably possible to persuade the sentencing judge that a sentence no greater and even less than that being recommended by the People was appropriate. The remarks were ignored by the sentencing judge, but are presented herewith as Exhibit "D" (pages 2 through 5 of the transcript of indeterminate sentence of December 17, 1993) because they speak to the efforts made by defense counsel to prevent this issue from arising.